2007/07/17 - IV. ÚS 23/05: RELEASE OF INFORMATION CONCERNING A JUDGE

HEADNOTES

The release of defamatory information concerning a person active in public life cannot be considered reasonable (legitimate) (1) unless it is proven that reasonable grounds existed for relying on the truthfulness of the defamatory information; (2) unless it is proven that available measures were taken to verify the truthfulness of such information, to such degree and intensity to which the verification of the information was available and definite; and (3) if the person releasing the defamatory information had reason not to believe that such information was true. The release of such information cannot be considered to be legitimate or reasonable also in cases when the disseminator of such information did not verify the truthfulness of the same by querying the person concerned by such information and did not make known the opinion of such a person, except in instances when such a procedure is impossible and/or in cases when such procedure was obviously not necessary (Lange v. Australian Corporation, 1997, cited in case Reynolds Lds. – see above). Examination of motive is an important point for assessing the legitimacy of the release of such information. Legitimacy cannot be inferred when such a release of information is predominantly motivated by a desire to aggrieve the person to which such data is related, and when the disseminator themself did not believe the information, and/or when they published it inconsiderately and with gross negligence without verifying whether the information was truthful or not.

The fundamental right to honour is applied in several spheres – the private domain, societal domain, civil domain and professional domain. The last three may be defined as a social sphere.

The first sphere actually involves protection of privacy, within which the right to honour is also undoubtedly applied. Principally, it is up to each individual what they release from this sphere as information suitable for the outside world and to what degree. In other words, this sphere is usually governed by complete self-determination as regards information.

The societal, civil and professional domains reflect the social nature of fundamental rights, or reflect the fact that an individual lives in a society and enters into communication with its other members, and, through their conduct or very existence, influences other members of the society. In this sphere, absolute self-determination in respect of information is no longer applicable. In other words, under certain circumstances, it is possible to enter into such a sphere, as the same might contain facts within a topic that justifies public interest. Thus, the social spheres may be interfered with through proportional interventions by a public power in order to protect the interests of society.

The outer edges of the social domain of an individual are part of the "public sphere". This is a segment of human life which may be perceived and acknowledged by anybody (Löffler/Rickler, Handbuch des Presserechts, 4th ed.,

2000, chapter 42, note No. 7). In this sphere, there are practically no restrictions on dissemination of truthful facts from it (Soehring, Presserecht, 3rd ed., 2000, note No. 19.40). It is obvious that this sphere of human life completely overlaps with the professional sphere of persons active in public life.

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THR CZECH REPUBLIC

A Panel of the Constitutional Court of the Czech Republic, consisting of Chairman Miloslav Výborný and Justices Eliška Wagnerová (Justice Rapporteur) and Vlasta Formánková, adjudicated on 17 July 2007 in the matter of a constitutional complaint filed by JUDr. Š. W., represented by JUDr. Jiřina Gyarfásová, an attorney at law with a registered office at No. 61, Radlická St., Prague 5, against a judgment by the High Court in Prague of 21 September 2004, No. 1 Co 85/2003-291, as follows:

I. The judgment by the High Court in Prague of 21 September 2004, No. 1 Co 85/2003-291 violated a fundamental right of the petitioner guaranteed by Art. 17 para. 1 of the Charter of Fundamental Rights and Basic Freedoms.
II. Therefore, this judgment shall be annulled.

REASONING

I.

1. In the constitutional complaint, sent by post on 12 January 2005, the petitioner sought the annulment of the judgment of the High Court in Prague in the case of a lawsuit for the protection of personality, by which an obligation to apologise to JUDr. S. P., the plaintiff, was imposed on Czech Television, the defendant. The petitioner, in such proceedings being in the position of a secondary party on the side of the defendant, claimed that the contested resolution violated her fundamental rights to freedom of expression and dissemination of information as established by Art. 17 para. 1 to 5 of the Charter of Fundamental Rights and Basic Freedoms (hereinafter "Charter"). Additionally, the right to judicial protection (Art. 36 para. 1 of the Charter) was allegedly violated, as well as Art. 37 para. 3 of the Charter, guaranteeing equality of parties to proceedings, and Art. 38 para. 2 guaranteeing the right to have a matter handled without unnecessary delay and the right to be present at the hearing of one's own case.

2. The constitutional complaint was filed timely (§ 72 para. 3 of Act No. 182/1993 Coll. on the Constitutional Court, as amended by later regulations (hereinafter "Act on the Constitutional Court")). Additionally, the Constitutional Court was obliged

to evaluate whether the complaint was admissible. According to case law of the Supreme Court of the Czech Republic, the secondary party to civil proceedings is not entitled to file an appeal on a point of law (cf. examples: a decision dated 27 May 2003, file No. 25 Cdo 162/2003 in Judicial Review No. 12/2003, and A Collection of Decisions of the Supreme Court of the Czech Republic, No. 25/2004). A yet unpublished decision of the Constitutional Court, dated 12 August 2004, file No. III. ÚS 390/04, implies that by filing a constitutional complaint only following a resolution being passed by a court of appeal on a point of law, secondary parties become exposed to the risk of having a complaint denied for lateness. Therefore, the constitutional complaint had to be considered as admissible (see also below in clause 9).

3. The claim of the petitioner concerning a violation of Art. 17 of the Charter states that the aim of her report was not to harm the judiciary as a whole, but to disseminate verified information and opinions of public interest. In addition, she wished to persuade, thanks to pressure from public opinion, a relevant independent body to re-examine whether the manner in which JUDr. P., the plaintiff, administered the political cases in question prior to November 1989 weakened trust in the judiciary or not. The aim was also to induce a public discussion concerning whether or not the plaintiff was rehabilitated after 1989 merely due to the fact that the relevant body did not have sufficient information on her actions in the judiciary prior to 1989, particularly as the relevant body based their decision on an untruthful statement from the plaintiff about having to leave the judiciary for political reasons after 1970. A person of a judge is one serving the public interest, some of whose personal rights are limited, and diminish when confronted with a justified interest for the provision of public information. The given report was based on public documents and did not touch on any private or intimate domains concerning the plaintiff, but was solely on matters of her professional life. Two resolutions in which the plaintiff was involved were annulled after 1989 by the Supreme Court, on the grounds of the law having been violated when passing said resolutions: to the detriment of Jazzová sekce (“Jazz Section”) and to the benefit of Mr. Kafka, an officer of the State Police. The petitioner tried to confirm opinion that the plaintiff belonged to a group of judges selected to deal with political trials using the registry of files of the Municipal Court in Prague, but the Chairman of the given court denied such verification. Such data was even not requested by the Regional Court in Prague, in spite of the fact that the same was proposed by the petitioner. The Regional Court first denied the indictment since they concluded that the report principally adhered to reality – the relevant panel was the only one dealing with such cases. Such factual findings were then altered by the High Court in Prague without presenting further evidence. Furthermore, the High Court irrelevantly added that the plaintiff had never been a member of the crime panel that adjudicated cases in first instance at the Municipal Court.

4. The petitioner derived the violation of Art. 36 para. 1 of the Charter from the fact that the doubts concerning judges of the Regional Court and the High Court being prejudiced were not refuted. The case should have been considered by a court not based in Prague, since the plaintiff has been active in the capital’s judiciary system since the end of the 1950s and has many personal and professional connections to judges there. A close friend of hers, who took part in the disciplinary proceedings against the petitioner, works at the High Court as well as

two other judges who were also witnesses, one of them being the Chairman of the High Court in Prague, and was additionally involved in one of the cases forming the subject of the dispute. Moreover, the system of judiciary functioning shows that judges at the High Court are dependant in their careers on the Chairman. However, objections of prejudice were overruled also by the Supreme Court of the Czech Republic (decision of 22 January 2004, file No. 26 Nd 211/2003 in http://www.nsoud.cz/rozhod.php).

5. The petitioner claimed that equality of parties to the proceedings (Art. 37 para. 3 of the Charter) was violated by a biased approach in how the objections were handled. The High Court dealt with the report without taking into account all its connections, and only from the viewpoint of the proposed verdict, which effectively lifted the statements under indictment out of context as regards the entire report, thus the meaning of the same was altered. In contravention of the objective nature of the proceedings on protection of personality, the court did not take into consideration the political attitudes of the plaintiff (now the secondary party), and did not assess her disciplinary file presented as evidence, despite the subject of the dispute actually being the personality of the plaintiff. Without justification, no evidence was presented based on registries of judicial files regarding cases in which the plaintiff participated in the period 1970-1989. The petitioner based her statement on the violation of her right to have a matter handled without unnecessary delay and in the presence of the person concerned (Art. 38 para. 2 of the Charter) firstly on the total length of proceedings, and secondly on documenting an incorrect procedure regarding the serving of a summons to the hearing at the High Court. Consequently, she was unable to ask questions of the key witness in the prosecution, the Chairman of the High Court in Prague. For all the reasons enumerated above, the petitioner proposed that the contested verdict be annulled.

6. Upon a request, the Regional Court in Prague submitted their opinion concerning the constitutional complaint by way of the Chairwoman of the panel, JUDr. Naděžda Křivánková. She denied the objection of exclusion from the case under consideration, since she had not known the plaintiff prior to the commencement of the proceedings, had never been a judge of the district served by the Municipal Court in Prague, and had never shown any bias whatsoever. The Regional Court dealt with procedural objections in the course of the proceedings, and considered the repeated bringing of the same to be neither adequate nor accordant with legal regulations. The High Court in Prague also made their opinion known through JUDr. Zdeňka Ferešová, Chairwoman of the panel, who referred to the repetitiveness of objections of the complaint and then to the reasoning of the contested judgment, and pointed out (in accord with said reasoning) that Czech Television, within extra-judicial negotiations, offered the plaintiff compensation for costs associated with the suit and an apology through a personal letter from Czech Television.

7. JUDr. S. P. and Czech Television, having the positions of secondary parties in the proceedings on the constitutional complaint, were also invited to submit their respektive opinions. Czech Television waived its position.

8. In her statement, JUDr. S. P. expressed a conviction that Article 17 of the Charter was not violated since exercise of the freedom of expression must not

conflict with the rights of citizens. The Charter does not protect the freedom of untrue and distorting information, or information infringing individual integrity and impairing personal honour and a dignified existence. The report contained incorrect information – engagement in a small group of judges charged with hearing political trials, a statement saying these judges should have been removed from the judiciary as a part of a purification process; and that judgments had been delivered in conflict with valid law – which, together with describing JUDr. P. as professionally and morally inapt and a judge exhibiting arbitrariness, caused stress to JUDr. P. and deeply harmed her dignity and civic honour, since she had been working in the crime department for dozens of years and has actually been training judges. JUDr. P. was a member of the "unification panel" which, in addition to economic criminal acts, passed decisions in appeals proceedings on criminal acts in accordance with provisions of § 100, 102, and 104 of the Criminal Code [note: these criminal acts included acts of sedition, defamation of the state and its representative, and defamation of a state of the world socialist system and its representative, which formed part of Head I of the Special Section of the Criminal Code]. In her own opinion, JUDr. P. could not have been a member of a small group of judges charged with handling political processes, since the criminal acts possible to define as acts of political nature were adjudicated by the Municipal Court in Prague only in the first instance, in accordance with the provisions of § 17 of the Criminal Procedure Code then in force [these criminal acts included those for which the lower limit of the penal rate amounted to five years of imprisonment, or where the death penalty may have been imposed, and criminal acts of terror, diversion, sabotage, subversion of state, and damnification of a state of the world socialist system, and criminal acts under the Act on Protection of Peace]. Witnesses – judges JUDr. Stutzig and JUDr. Ječný – were members of the same panel and sufficiently testified concerning her professional skills and denied she would reach decisions in contravention of the then valid legal order. Besides, any resolutions would be taken by the panel as a whole. The case of Jazz Section was a matter of economic nature, despite also being somewhat political. Furthermore, the role of JUDr. P. was described by JUDr. Stibořík. According to JUDr. P., the independence and impartiality of the court was beyond doubt since the very length of the process indicated she had not been advantaged in any way. JUDr. P. noted that an apology had already been broadcast, and concluded that the data referred to by the petitioner implied that the true reason for producing such a grossly discrediting and denouncing report was that JUDr. P. chaired the disciplinary panel which ruled that the petitioner be removed from the office of judge. It was then the petitioner took against JUDr. P. and the television broadcast was in revenge.

II.

9. Prior to collecting the data for possible deliberation on the merits of the case, the Constitutional Court evaluated whether the constitutional complaint met all formal particulars. Specifically, the Constitutional Court assessed whether the complaint should be denied due to the fact that it might have been filed by an evidently unauthorized person or could be inadmissible (§ 43 para. 1 clause c), e) of Act No. 182/1993 Coll. on the Constitutional Court in the wording in force). However, the Constitutional Court reached a negative conclusion for the following reasons. By putting forward the constitutional complaint, the petitioner seeks

protection of her fundamental right to free expression guaranteed by Art. 17 para. 1 of the Charter. In accordance with Art. 4 of the Constitution of the Czech Republic, fundamental rights are under the protection of the judicial power. Such rights must be protected particularly by ordinary courts. In the hearing before the ordinary courts, the petitioner had the procedural status of a secondary party on the side of the defendant. This meant that upon a standard interpretation of the procedural regulation (the Civil Procedure Code) by the ordinary courts, her procedural acts, in terms of the scope of the rights exercised, were principally restricted by the exercise of the rights of the party on the side of which the petitioner was standing. It is evident that the standard interpretation of the Civil Procedure Code appears to be insufficient in the case when a fundamental right itself is at stake, and the bearer of such a fundamental right in this instance is the secondary party alone. Under these circumstances, the Constitutional Court had to conclude that the petitioner was a party indeed entitled to file a constitutional complaint for the protection of her fundamental right to the freedom of expression. Similarly, it was necessary to conclude that the constitutional complaint was admissible since the petitioner, upon a standard interpretation of the Civil Procedure Code, did not have any separate right to file an appeal on a point of law against the judgment of the court of appeal to the extent she could define herself. In other words, the petitioner did not have at her disposal any procedural means for the protection of her fundamental right to free expression other than the constitutional complaint. Under such circumstances, it was necessary to conclude she was indeed an authorised person filing an admissible petition (see also clause 2).

III.

10. The Constitutional Court requested a file from the Regional Court in Prague, file No. 36 C 28/99, from which the Constitutional Court ascertained the following factual information.

11. By a judgment dated 23 September 2002, file No. 36 C 20/99, the Regional Court granted the indictment by judge JUDr. S. P., and imposed on Czech Television the obligation to apologise by airing the following: “The statements released in the programme “Nadoraz”, broadcast on 16 November 1998 and 17 November 1998, in a report entitled “Soudkyně” (A Judge) by which JUDr. S. P., a judge of the Municipal Court in Prague, was described as a judge who should have been removed from the judiciary within the purification process, since she had been adjudicating in contravention of the valid law, are not based on truth and were intentionally distorted and taken out of context”, this on two consecutive days within a main news programme. The court denied a proposal of payment for compensation for immaterial detriment amounting to CZK 800,000 with 20% default interest, as well as a proposal to declare as untrue the statement that the plaintiff “was, prior to November 1989, a member of a small group of judges charged with adjudicating political trials”. The fact that various cases were assigned according to a work schedule was, for the Regional Court (p. 4), reason enough to disprove the statement of the plaintiff that she had participated in the criminal cases specified above completely randomly and exceptionally. The Regional Court did not accept (p. 4) objections that international treaties had been violated in the given

cases, as this country was allegedly bound by the same only following 1989, and the judges could not take such treaties into consideration before that. The court also stated that the report did not influence relationships between the plaintiff and her colleagues and employees (p. 3).

12. The Regional Court arrived at this ruling in light of the circumstance that the Regional Court's first verdict, dated 27 November 2000, file No. 36 C 20/99, completely denied the indictment as unjustified, concluding that the statement that the plaintiff was one of the group of persons adjudicating political trials was in fact truthful. Other statements were not justified, but the plaintiff did not prove (leaf number 149) that the same had caused any detriment to herself (considerable discrepancies appeared here; the statement of psychological detriment, as well as another on the plaintiff receiving verbal attacks by telephone, and on reactions of relatives, were not confirmed). Nevertheless, the dismissive judgment was annulled by the High Court in Prague for its alleged non-reviewability since, according to the provisions of § 13 of the Civil Code, origination of liability is not principally based on the origination of actual detriment; ascertainment that actually such an infringement occurred in the right to protection of personality that was objectively capable of injuring the rights protected by the provisions of § 11 et seq. of the Civil Code is sufficient. According to the High Court, the term "honour" also includes professional honour, and the court should have first resolved whether the infringement actually occurred, and only then it was proper to deal with justness of requirements for protection. According to the High Court, the Regional Court's original verdict allegedly did not contain any conclusion as to opinion on the evaluation of the plaintiff as a judge that should have been removed from the judiciary as part of purification process. According to these guidelines, the Regional Court's second judgment stated that they, within the original judgment, did deal with the issue of whether the plaintiff, prior to November 1989, had been adjudicating in conflict with the valid law. However, then as now, they concluded that it was not proven as true, since the plaintiff adjudicated in accordance with the then valid legal order. The judgment of the Supreme Court (11 Tz 9/91) annulled the resolution in the case of Jazz Section on the grounds of violation of procedural regulations, which allegedly were not part of the legal order at the time of taking the annulled resolutions, as allegedly explained (?) to the court by JUDr. Stibořík, Chairman of the High Court in Prague, as a witness. The criminal conviction of M. K. and I. M. for sedition, consisting of distributing documents of Charter 77, was not evaluated by the Supreme Court of the Czech Republic, since "they had been rehabilitated and, therefore, such a statement relating to the plaintiff is not truthful". The file implies that the petitioner, within the proceedings, continually raised the objections contained in the constitutional complaint. Within the proceedings, the plaintiff declared (leaf number 94) as "inaccurate" her statement that she had had to leave the judiciary in 1970. A witness, Bedrna, (leaf number 142), who was the Chairman of the Municipal Court from 1980 to 1988, stated that at that time there was no political obstacle on the part of the plaintiff for the exercise of the office of the Chairwoman of the panel.

13. On the basis of appeals by all parties, the case was again dealt with by the High Court in Prague, which, by a judgment dated 21 September 2004 (1 Co 85/2003-291), changed the verdict on the imposed obligation to apologise by omitting the words "and were intentionally" before the word "distorted" (as they are allegedly

a subjective evaluation). Furthermore, the court extended the apology with a text by which they designated as untrue the statement that JUDr. P. was a judge who was, prior to November 1989, a member of a small group of judges charged with adjudicating political trials. The reasoning, in addition to a reference to prior proceedings (p. 2) where it had been allegedly proven that "the named persons were convicted in accordance with the then valid legal order", states (p. 5) that the defendant had not proven her statements. The plaintiff had not ruled as a single judge but as a member of an appeals panel, and had not been a member of the panel at the Municipal Court dealing with first-instance proceedings on criminal acts against the state. The annulment of the judgment in the case of Jazz Section by the Supreme Court was, according to the High Court, a result of differing legal opinion and did not justify the verdict that the plaintiff adjudicated cases in conflict with the law, which is a claim of fact. According to the court of appeal, the circumstances of the case justified that "the case be set right" in public. Furthermore, the High Court overturned a previous ruling by ordering the proposal for monetary compensation for immaterial detriment to continue to additional proceedings, since monetary compensation is completely proper given the objectively considerable intensity of the infringement.

14. A part of a file of the Regional Court in Prague, file No. 36 C 20/99, comprised a video recording of the report in question, broadcast by Czech Television on 16 November 1998 as part of the "Nadoraz" programme (leaf number 25), which was presented by the Regional Court as evidence (leaf number 92). The file (leaf numbers 166 and 281) does not specify that the report (be it in the form of video recording or a transcript of the same) was presented by the High Court in Prague as evidence, and thus it is not possible to ascertain how the court of appeal familiarised itself with the overall contents of the report under consideration. Therefore, the Constitutional Court obtained a verbatim transcript, which was presented as evidence. A brief summary of the contents of this thirteen-minute report follows.

15. The introduction by Rebeka Křižanová, a reporter, contains the appeal: "The judiciary should remove not only judges professionally incompetent, but also those who are incompetent morally." Judicial arbitrariness has never been punished, no judge has been hauled up before a court for violating the law, yet the law was violated, as may be seen in the following report (this being the work of the petitioner). The petitioner is described as a person well versed in these issues since, after November 1989, she worked as a judge for several years. Then follows a report on criminal proceedings against an officer of the State Police, a Mr. Kafka, who was convicted for conducting harrowing methods of interrogation on Vlastimil Třešňák, but only received a fine of CZK 50,000. The leniency of this penalty brought about criticism from the public, which is evidenced by articles in two national newspapers. Then follows a hypothesis by the petitioner linking the softness of the sentence applied to this executor of totalitarian power with the professional past of the Chairwoman of the panel. Attempts by the petitioner to acquire data on the past career of JUDr. P., which were carried out over the telephone with JUDr. P. herself, with the Municipal Court in Prague, and with the Minister of Justice, are documented. However, provision of such data was denied with reference to the confidential nature of the same. The petitioner then specifically asked the Minister of Justice about the ruling in the case of Jazz

Section, which the Minister denied with reference to his privileged status, as he had been the defence counsel in the given matter.

16. The report then continues with interviews with members of Jazz Section, who expressed their opinions that the case possessed political implications from the very beginning, but the mood of "perestroika", and especially an upcoming visit by Mikhail Gorbachev, the head of the Soviet Communist Party and state, seemed unsuitable conditions to hold a political trial, hence the convictions of unlicensed business activities. The unconditional punishments imposed are then described. Afterwards, the report continues by stating the sentence was annulled following 1989 by the Supreme Court, and a query was addressed to Eliška Wagnerová, then the Chairwoman of the Supreme Court of the Czech Republic, as to whether it might have been possible for a judge prior to 1989 to oversee a political trial accidentally, such as the prosecution for sedition allegedly committed by signing Charter 77 and through contacts with members of the same. The Chairwoman of the Supreme Court of the Czech Republic dismissed this by saying: "we all know these cases were dealt with by judges especially elected for the task." Following studies of the reasoning of the judgment by the Supreme Court of the Czech Republic by which the judgment over the members of Jazz Section was annulled, the Chairwoman of the court declared that it truly had been a political trial. The petitioner then states that JUDr. P. adjudicated the cases of both members of Jazz Section in 1987 and Mr. M. K. and Mr. I. M. in 1978, on whom she imposed harsh unconditional punishments for sedition. Subsequently, the Minister of Justice is again asked to reiterate whether JUDr. P. was "one of the few proposed by the Minister to be recalled on the grounds of her career as a judge before 1989". The Minister's response was that he considered JUDr. P. as having been "re-nominated" and that she had not been impugned even in proceedings held at the initiative of Výbor na obranu nespravedlivě stíhaných (VONS; The Committee for the Defence of the Unjustly Persecuted). A spokesperson for the Ministry refused to publicise both the specific reasons for which five judges had faced a petition for their removal in 1993 and their specific names, saying that the Ministry had "lost" the case. The disciplinary panel did not find the judges guilty, and that is why the spokesperson saw no reason why the judges' names should be "blackened" after such a long time. The report further states that JUDr. Jiří Novák, the Minister of Justice, did file a petition to remove JUDr. P. from her post. An attorney from the professional circles of VONS remarked that there is no political will to address the past and investigate the judiciary. The report concludes with the following: "The Ministry of Justice has provided us with only fragmentary data on Judge P. Oddly enough, they imply that she did not perform the duties of a judge from 1970 to 1990. Judicial functionaries, however, have an understandable reason not to inform the public in any way on the career of Judge P., as she was, before 1989, a member of a small group of judges charged with adjudicating political trials. The case of Judge P. proves that the purification of the Czech judiciary has not been completed". This is followed by a wish that justice eventually prevails.

17. Since the Justice Rapporteur also spoke in the report, JUDr. Eliška Wagnerová felt obliged to request (on 29 June 2005) that Panel III of the Constitutional Court decide whether she should be excluded from the case under consideration due to the above reason (§ 36 para. 1 of the Act on the Constitutional Court), or whether she might be seen by the outside world as biased, despite having no relation to the

plaintiff or the petitioner and does not feel any bias. The third panel of the Constitutional Court, on 13 July 2005, decided that, on the basis of the contents of a file and a letter from the Justice Rapporteur, the conditions necessary for exclusion were not fulfilled.

IV.

18. The file of the Regional Court in Prague implies that, in the course of the proceedings, other files were added to it upon proposals by the parties; the following parts of the same are presented by the Constitutional Court as evidence.

19. Copies of resolutions in the case of M. K. and I. M. (the judgment of the District Court for Prague 10 dated 9 August 1978, file No. 1 T 47/78, and decision of the Municipal Court in Prague dated 15 September 1978, file No. 5 To 111/78) imply that JUDr. P., as the Chairwoman of the panel of the Municipal Court in Prague, took part in sentencing M. K. and I. M. to unconditional punishments of imprisonment for 12 and 18 months respectively for the criminal act of sedition, which they, as signatories of Charter 77, allegedly committed by distributing printed matters aimed against the socialist order, by which they wanted to raise mistrust towards said order. Unlike the District Court, the Municipal Court took into consideration that the act had been committed at a time of "increased ideological diversion" and the "perpetrators" attempted to hinder a successfully completed process of consolidation, which commenced after 1968. The District Court for Prague 10, on 18 February 1991 (Rt 443/91), declared these resolutions annulled as of the date of their passing; such a procedure regarding the "criminal act" of sedition was prescribed by the Act on Judicial Rehabilitation (§ 2 para. 1 clause d) of Act No. 119/1990 Coll.). JUDr. P. herself, within the proceedings forming the subject of the present review, defined such a trial to be a political one (see file No. 36 C 20/99, leaf number 93, verte).

20. The file of the District Court in Prague 4 file No. 2 T 23/86 shows that JUDr. P. presided over the panel which, in appeals proceedings (the decision of the Municipal Court in Prague, dated 12 May 1987, No. 5 To 68/87-1756) confirmed the judgment of the District Court for Prague 4 (dated 11 March 1987, No. 2 T 23/86-1675), by which unconditional punishments of imprisonment for 16 and 10 months respectively were imposed on two members of (i.a.) the Committee of the Jazz Section of the Union of Musicians of the Czech Republic (hereinafter also "JS") for unlicensed business activities (§ 118 para. 1 of the Criminal Code), for distributing publications by the JS, which was in conflict with Act No. 94/1949 Coll. On Publishing and Distributing Books, Sheet Music and Other Non-periodic Publications, since the same took place even following the dissolution of the Union of Musicians of the Czech Republic (supported by the Ministry of the Interior by the Act on Temporary Measures to Consolidate Public Order, No. 126/1968 Coll.). The District Court dealt with the case following the Municipal Court (leaf number 1487) annulled its resolution (due to which the District Court returned the case for additional examination to preparatory proceedings) and ordered the case to be adjudicated. The Municipal Court in its affirmative decision stated that the actions were aimed against the fundaments of the economic system and, therefore, from the viewpoint of public danger, it is irrelevant that such operations did not serve

for personal enrichment and that the publications printed were beneficial, since it was factually relevant that the editorial work was not permitted. The Supreme Court of the Czech Republic annulled such resolutions on the basis of the complaint on the violation of the law by a judgment (dated 24 April 1991, file No. 11 Tz 9/91-1902) and stated that the charges against the members of the Committee of the JS (§ 163 para. 1 of the Criminal Procedure Code in the wording in force at the time of delivery of the judgment by the Municipal Court) were not preceded by any commencement of criminal prosecution (§ 160 para. 1 of the Criminal Procedure Code in the wording in force at the time of delivery of the judgment by the Municipal Court) for unlicensed business activities. The Supreme Court refused to apply § 19 and § 22 of the International Covenant on Civil and Political Rights (hereinafter "Covenant") but stated that there was an insufficient factual basis for assessment of culpability, and identified themselves with the fact that objections to the lack of public danger of the act should have been taken into account. The file contains several letters from members of Amnesty International from all around the world (such as leaf numbers 1404, 1425, 1456, 1458, 1462, and 1470), as well as a letter from the wives of the members of the Committee of Jazz Section to the President of the Czechoslovak Socialist Republic (dated 3 December 1986, leaf numbers 1396 and 1483), in which they note that despite the fact the case centred on economic criminality, pressure was exerted upon the defendants for them to give their opinions on political accusations and sign politically motivated declarations, and that some interrogations lasted for as long as 17 hours (a letter was presented as evidence by the Regional Court in Prague – leaf number 143).

21. From the disciplinary file maintained against Judge P. (file No. Ds 5/93 of the High Court in Prague), the Constitutional Court ascertained that the Minister of Justice filed, on 17 December 1993, a proposal for her removal from the office of judge on the grounds of her participation in convicting Mr. K. and Mr. M. for disseminating opinions and ideas at the time when the Covenant had already been published, which the Minister considered to be a gross disloyalty to the obligations of independent judicial decision making, also taking into account the inappropriate and unjustified severity of the sentences. The High Court did not grant the petition from the Minister (29 March 1994, DS 5/93-33) and this resolution was also later confirmed by the Supreme Court of the Czech Republic (31 August 1994, DS 5/93-68). However, the Supreme Court did not align itself with the opinion of the High Court that such a removal from office is precluded by the constitutionally established independence of a judge, since otherwise no transformation of the judiciary would be possible (§ 67 para. 1 of Act No. 335/1991 Coll.). The opinion of the High Court on the non-applicability of international treaties was confirmed, and such treaties were described as a commitment of an ethical nature. According to the Supreme Court of the Czech Republic, the resolution passed by the panel of Judge P. deviated from legal assessment in terms of ideological nature, however, the Supreme Court of the Czech Republic concluded that the Act predominantly intended not to punish judges for individual and thoroughly singular excesses but for employing a certain style of working which, in the given case, was not claimed, let alone evidenced.

22. From the disciplinary file maintained against the petitioner (file No. Spr 1161/93 of the Municipal Court in Prague), the Constitutional Court ascertained that the petitioner was, on 11 March 1994 (leaf number 72), removed from the

office of judge of the District Court for Prague 3 by a panel presided over by JUDr. P. The panel of the High Court in Prague denied (leaf number 118) an objection of prejudice by JUDr. P. (justified by the fact that she herself was facing disciplinary proceedings), and the same panel also denied, on 29 June 1994 (leaf number 146), an appeal by the petitioner against her removal from the office of judge by not granting her objections. The panel was presided over by JUDr. Stanislav Látal, (in his own words) a friend (Ds 5/93-6) of JUDr. P. and a judge of long-standing of the Supreme Court of the Czech Socialist Republic. The petitioner was removed since she refused to take charge of panel 5 C, refused to deal with civil agenda until a certain point in time, and did not arrive at her office on 30 and 31 August 1993. This was an inadequate response by the petitioner to work overload, since she had been, during a short period of time, reassigned to various agendas, and she resisted taking charge of a panel burdened with delays.

V.

23. The Constitutional Court concluded that the constitutional complaint is justified.

24. When evaluating the constitutional complaint, the Constitutional Court employed the following principles:

A) Freedom of expression

25. The fundamental right to free expression must be considered a constitutive element of a democratic and pluralistic society, in which everyone is permitted to express an opinion on public matters and to make evaluative judgments on them.

26. All the agendas of state institutions, as well as the activities of persons active in public life, e.g. the endeavours of local and national politicians, officials, judges, attorneys, or candidates or aspirants to these offices, are deemed a public matter. The arts, including show business, and everything that attracts public attention, are also public concerns. These public matters, or endeavours of individual persons may be judged publicly. In constitutional terms, critical observations on public matters carried out by publicly active persons are subject to the presumption that such criticism is permitted. It is purely an expression of a democratic principle, the expression of participation by members of a civic society in public matters.

27. If the freedom of expression of an individual delivering critical observations is, in such cases, restricted by a resolution of a court, it is necessary that the person concerned prove the remarks were not expressed bona fide or such comments were unfair. In this, the presumption of permitted criticism protects merely an evaluative judgment, not the claiming of facts; the critic alone must prove such facts by evidence to the degree that the same served as the basis for the criticism. Only statements of true facts are principally protected. The requirement that critics themselves must prove the facts claimed is a European constitutional standard (e.g. the resolution of the House of Lords dated 28 October 1999 in the

case Reynolds v. Times Newspapers Limited, or the resolution of the German Federal Constitutional Court dated 3 June 1980, 1 BvR 797/78 in the case of Böll) confirmed also by case law of the European Court of Human Rights (hereinafter "ECHR"; e.g. resolution of the Grand Chamber dated 17 December 2004 in the case Pedersen and Baadsgaard v. Denmark).

28. Other general principles applied in case law of European constitutional courts, as well as in case law of the ECHR, are as follows: the release of defamatory information concerning a person active in public life cannot be considered reasonable (legitimate) (1) unless it is proven that reasonable grounds existed for relying on the truthfulness of the defamatory information; (2) unless it is proven that available measures were taken to verify the truthfulness of such information, to such degree and intensity to which the verification of the information was available and definite; and (3) if the person releasing the defamatory information had reason not to believe that such information was true. The release of such information cannot be considered to be legitimate or reasonable also in cases when the disseminator of such information did not verify the truthfulness of the same by querying the person concerned by such information and did not make known the opinion of such a person, except in instances when such a procedure is impossible and/or in cases when such procedure was obviously not necessary (Lange v. Australian Corporation, 1997, cited in case Reynolds Lds. – see above). Examination of motive is an important point for assessing the legitimacy of the release of such information. Legitimacy cannot be inferred when such a release of information is predominantly motivated by a desire to aggrieve the person to which such data is related, and when the disseminator themself did not believe the information, and/or when they published it inconsiderately and with gross negligence without verifying whether the information was truthful or not.

29. As regards evaluative judgments, exaggeration and hyperbole alone, even if harsh, do not make expression non-permitted. Even inappropriateness in the critic's opinion in terms of logic, or the prejudice of the same, do not, by themselves, allow for a conclusion that the critic went beyond the bounds of expression that can be described as fair. Only in cases of criticism of matters, or actions by persons active in public life, which completely lacks a substantive basis and for which no justification can be found (general criticism), is it necessary to consider such criticism beyond the bounds of fair expression. It is always necessary to evaluate the entire expression as it appeared within the particular literary, journalistic or other form; a single expression or sentence lifted out of context may never be evaluated.

30. The media play an irreplaceable role in informing individuals on matters of public interest. They publicise information on contemporary events, on trends within the life of a nation and society. The media make it possible to maintain public discussion where various opinions are exchanged, and thus provide individuals and various groups with opportunities to create general opinions. The media thus represent a decisive factor in the permanent process of forming opinion, as well as in eventually motivating the will of individuals, groups and political institutions.

31. Each broadcast, be it a television or radio programme, plays a role in opinion being generating, as a result of the selection and manner of adapting the given subject. The media and their output cannot be evaluated in advance on the earnest nature of the contents of said output or according to whether such contents are compatible with respectable private or public interests. Such an advance evaluation of the media, effectively resulting in the media being under state control, would directly contradict the fundamental right to free expression the media help to provide. In other words, each broadcaster, in connection with any programme broadcast, may claim protection by referring to the fundamental right to free expression, be it a political broadcast, a review programme addressing issues of public interest, or artistic and entertainment programming. Freedom of expression is possessed by the media without the media alone having to prove the "validity" or "legitimacy" of interest in broadcasting a given programme. The fundamental right of the media to free expression thus protects not only the given issue, but also the type and manner of its adaptation.

32. Only when free expression conceived in such a manner comes into conflict with other legal values protected by the constitutional order or statutes passed for such purpose for which free expression may be restricted, as specified by Art. 17 para. 4 of the Charter (e.g. rights and freedoms of others, state security, national security, protection of public health and morale), conditions arise for examining the intended purpose of a specific programme, the manner and type of adaptation of the subject, as well as the resultant or anticipated effects of the broadcast. However, none of the restrictions to free expression mentioned above, executed by an ordinary statute with the above-mentioned permissible purpose, should bring into question the freedom of expression itself. On the contrary, such restrictive statutes must be interpreted with respect to free expression and, if necessary, also in a restrictive way to such a degree that adequate realisation of the very freedom of expression is secured. In order to meet these requirements, it is necessary in the given case to weigh up the legal values generally and specifically present in the given case that conflict with each other.

B) Right to honour

33. The fundamental right to honour is applied in several spheres – the private domain, societal domain, civil domain and professional domain. The last three may be defined as a social sphere.

34. The first sphere actually involves protection of privacy, within which the right to honour is also undoubtedly applied. Principally, it is up to each individual what they release from this sphere as information suitable for the outside world and to what degree. In other words, this sphere is usually governed by complete self-determination as regards information.

35. The societal, civil and professional domains reflect the social nature of fundamental rights, or reflect the fact that an individual lives in a society and enters into communication with its other members, and, through their conduct or very existence, influences other members of the society. In this sphere, absolute self-determination in respect of information is no longer applicable. In other

words, under certain circumstances, it is possible to enter into such a sphere, as the same might contain facts within a topic that justifies public interest. Thus, the social spheres may be interfered with through proportional interventions by a public power in order to protect the interests of society.

36. The outer edges of the social domain of an individual are part of the "public sphere". This is a segment of human life which may be perceived and acknowledged by anybody (Löffler/Rickler, Handbuch des Presserechts, 4th ed., 2000, chapter 42, note No. 7). In this sphere, there are practically no restrictions on dissemination of truthful facts from it (Soehring, Presserecht, 3rd ed., 2000, note No. 19.40). It is obvious that this sphere of human life completely overlaps with the professional sphere of persons active in public life.

37. Because the right to personal honour and good reputation guaranteed by Art. 10 para. 1 of the Charter (this right is not guaranteed by the Convention) can not be restricted by ordinary statutes, the purpose of which would be designated by the Charter in the form of public values (for instance, as in the case of freedom of expression), possible restrictions of this right must be sought in the category of immanent restrictions, i.e. those arising directly from the constitutional order itself. Such an immanent restriction of the fundamental right to honour may also be found in the requirement for a public power's respect for fundamental rights of third parties, and an obligation on the part of public power to protect the fundamental rights of third parties. In the given case, the very right to free expression comes into consideration. However, it is always necessary to weigh up competing values with respect to specific factual basis in such a sense and way that both competing values are maintained to the largest possible degree, and, should this prove impossible, the intervention in one of the competing values must be justified using principles of proportionality.

38. These principles, which are applied in evaluating measures by a public power by which a fundamental right of an individual is restricted, must also be adequately applied in cases when ordinary courts decide on cases related to colliding interests of private entities, that is in judicial deliberations in civil cases.

39. Professional honour and a good professional reputation, as was stated earlier, belong solely to a social sphere, more precisely to the outer edge of the same, where the public domain is formed. Therefore, from the constitutional viewpoint it is acceptable when, for example, the Ministry of Justice provides the media with data on proposals for disciplinary sanctions against judges. As far as courts of law are concerned, according to the now valid provisions of § 11 of Act No. 106/1999 Coll. on Free Access to Information, only information on criminal proceedings in progress and information on activities concerning the decision making process of courts are excluded from the duty to provide information. The decision making process of courts, however, cannot be considered identical to the verdicts of the courts or judges alone (even when chairpersons of some ordinary courts conduct matters in this very way). On the contrary, such verdicts must be made available to the media upon request, in complete adherence to the purpose of the Act on Free Access to Information, after payment of administrative fees, naturally. In the same way, this Act cannot prevent chairpersons of courts or the Ministry of Justice from providing information on the professional careers of individual judges. Such

interpretation of the Act is correct precisely due to the fact that professional reputation – a derivative of which is professional honour – falls within the social category and belongs to the public domain, as was explained earlier. In the case of judges, such intervention by the state into this part of their personality is made possible by a specific purpose, this being an attempt to secure a personally and professionally unimpeachable judiciary. The specified data relating to this sphere of life are also relevant for assessing the impartiality and independence of individual judges in connection with deliberations concerning individual cases. The personnel departments of courts should release such data to the media upon request to allow the media to discuss and analyse, in an informed manner, the professional experience of the judges in connection with the process of formulating verdicts. This is actually an acknowledged method employed by political science, based on thoughts of a philosophical school of legal realism, as commonly applied in the USA. After all, these ideas are the basis for the selection of justices of the Constitutional Court, where candidates are subjected to thorough examination in the Senate of the Parliament of the Czech Republic as regards their professional past.

VI.

40. The petitioner developed a report which, according to the ordinary courts, unlawfully infringed the personal rights of the secondary party, Judge S. P. The crux of the dispute is thus a conflict between the freedom of expression (Art. 17 of the Charter) of the journalist and the protection of honour of the judge (Art. 10 of the Charter). The Constitutional Court focused their examination on the contested resolution of the appeals court, which changed the resolution of the first-instance court.

41. The contents of the report under consideration show that it was an immediate reaction to the conviction of Josef Kafka for his "inadequate conduct" (harrowing interrogation and physical torture as part of lawless coercion to emigrate) towards Vlastimil Třešňák. The secondary party was the Chairwoman of the panel that imposed a monetary punishment for such conduct, which large part of the media, including the petitioner's report, considered to be overly lenient. It is necessary to note that the report was dedicated to the issue of purging the judiciary following 1989 (see also the date of broadcast). In the report, the petitioner asked whether the reason for such a decision may be related to the professional past of the Chairwoman of the panel (i.e. the secondary party).

42. According to the petitioner's hypothesis (actually expressed in the form of a question), the attitude of judges towards the period when the Czechoslovak Socialist Republic was not a law-based state, when judicial independence did not apply (cf. a contrary opinion of the plaintiff on leaf number 94 verte), and judges participated in hampering human rights, may arise from the professional past of specific judges. When developing the report, the petitioner tried to verify her hypothesis, but the bodies administering the necessary information (the Chairman of the court – leaf number 111, the Ministry, including the then Minister of Justice – see the report for details) failed to provide her with the information needed, and thus blocked the easiest and most natural way of verifying or disproving the

hypothesis. Furthermore, the secondary party refused to answer the petitioner's questions. Evaluating the accuracy of the facts presented by the petitioner must be determined by this fact. The petitioner was denied access to verification of such information (leaf number 143). The Chairman of the Municipal Court in Prague (leaf number 7) notified the director of Czech Television, on 20 October 1998, of the disciplinary misdemeanour of the petitioner, herself formerly a judge who had entered and left the judiciary after November 1989, and refused to connect the report under preparation with the issue of self-regulatory mechanisms in the judiciary. Denial of access to such information was reasoned by an attempt on correctness. However, it must be taken into account that restriction of access to information forces journalists to self-censor or even abandon the issue, which may weaken the role of journalism in the control of power. Indeed, the investigative report attempted to explain a possible cause for insufficiently addressing the past in the judiciary, which was a legitimate issue of public interest that was, at that time, highly topical, this being also evidenced by a number of articles and interviews in the press, as well as items in other media.

43. The petitioner was not discouraged and continued to verify her hypothesis by analysing deliberations available to her that had been authored or co-authored by the secondary party, as well as by interviewing both victims of the Communist judiciary and high-ranking judicial officials. She also approached the secondary party, in the knowledge that the Minister of Justice wished to remove her from the office of judge at the end of 1993. Being equipped with carefully collected findings, the petitioner formulated a conclusion that the secondary party had been a member of a small group of judges charged with adjudicating political trials, and that she had been evaluated as being a judge who should be removed from the judiciary, since she had adjudicated in conflict with the law valid at the time. The secondary party felt that her honour was aggrieved by these statements which the Constitutional Court considers to be claims of fact and, by way of an action, demanded an apology. Such a claim was granted by the High Court in Prague by the resolution being now contested.

44. As for the first statement: "The secondary party was a member of a small group of judges charged with adjudicating political trials."
a) The factual finding of the High Court that the statement that the secondary party had been a member of a small group of judges dealing with political criminal acts is untrue does not correspond to evidence presented in proceedings before the ordinary courts, said proceedings having been completed by the Constitutional Court during proceedings on the constitutional complaint. On the contrary, the evidence presented testifies to the correctness of the conclusion of the Regional Court in Prague, which, in a judgment dated 27 November 2000 and another dated 23 September 2002, both file No. 36 C 20/99, stated that in this respect the finding suffices that the plaintiff was a Chairwoman of the Municipal Court's panel which, as the only one in appeals proceedings, passed decisions on criminal cases dealt with at the first instance pursuant to Head I of the Criminal Code (including the criminal acts of sedition, subversion of the state, and emigration), and concluded that the petitioner's statement in question "is essentially true to reality". This conclusion by the Regional Court corresponds to the social fact that judicial repression in the 1970s and 1980s was not conducted routinely but directed at specific targets. There were not many condemnatory sentences. Twelve judgments

(cf. in: Collective: Soudní perzekuce politické povahy v Československu 1948-1989 /Judicial Persecution of a Political Nature in Czechoslovakia 1948-1989/, Prague, Institute of Contemporary History of the Academy of Sciences of the Czech Republic, 1993, p. 187) out of the total number of condemnatory judgments for sedition, delivered in the district of the Municipal Court in Prague from 1975 (when JUDr. P. rejoined the Municipal Court) to 1989, were annulled on the basis of an Act on Rehabilitation. Political influence on the judiciary was, at that time, asserted generally by selecting certain people (Šámal, P., K úpravě trestního procesu v letech normalizace /On Arrangements of Criminal Proceedings in the Years of "Normalisation"/, in: Vývoj práva v Československu v letech 1945-1989 /Development of Law in Czechoslovakia in 1945-1989/, Prague, Karolinum, 2004, p. 310). The "unification panel", of which the secondary party was a member, also exercised significant supervisory entitlements (leaf number 140 verte) in relation to District Courts, and initiated complaints on the violation of law, which were an important tool of political intervention (see text quoted above, pp. 329 and 330).

b) In the above-specified resolution, the Regional Court stated that Mr. K. and Mr. M. were rehabilitated ex lege (§ 2 para. 1 clause d) of Act No. 119/1990 Coll. on Judicial Rehabilitation). This fact alone makes it possible to define their trial as a political one, which is implied from the purpose of the rehabilitation act, not to mention that the secondary party herself described their trial as a political one (leaf number 93 verte). Charter 77 (as is also implied from her text) was a challenge for democratic discussion; the individuals behind it struggled for human rights to be maintained and highlighted lawlessness and violations of the Constitution in place at the time (in Kuklík, Jan and Jan, History 4 for High Schools, Latest History, Educational Publishing House, Prague, 2002, p. 197).

45. In the case of Jazz Section, the circumstances merely seem more complicated. The statement by the secondary party that the trial was not a political one must be considered to be merely an alibi. Jazz Section was successfully dedicated to independent editorial work as a form of dissent (Kuklík, J., J., see text quoted above, p. 198). Besides, letters from Amnesty International, as well as a letter to the President of the Czechoslovak Socialist Republic (see clause 20 above), must have surely indicated to an experienced judge that the core of the case was a political one. "Trials in which defendants were convicted for acts of another, usually economic, nature, intentionally construed to be applied as tools of political pressure or revenge may be considered to be politically motivated trials." (cf. in Collective: Soudní perzekuce politické povahy v Československu 1948-1989 / Judicial Persecution of a Political Nature in Czechoslovakia 1948-1989/, Prague, Institute of Contemporary History of the Academy of Sciences of the Czech Republic, 1993, pp. 35 and 38). During the years of "normalisation", state power was more cautious, and politically motivated acts were designated solely as criminal acts (Collective: Dějiny zemí Koruny České II. /History of Lands of the Czech Crown II/, Litomyšl, Paseka, 2003, p. 303). One of the convicted persons explained in the given report why "the time was not suitable for a political trial". And yet the Constitution then in force formally guaranteed freedom of the press (Art. 28 para.1). Therefore, the case was the same as with the signatories of Charter 77 – judicial sanction for the exercise of (formally guaranteed) political rights. Totalitarian regimes, in order to give an impression of legitimacy, often covered repressions against their own citizens with the veil of the law (the official

representatives of the Czechoslovak Socialist Republic have always denied the existence of political prisoners), in order to maintain the appearance of lawfulness; criminal law is a suitable means for giving an impression of lawfulness (cf. e.g. Šámal, P., see text quoted above, p. 307 et. seq).

46. Courts of a democratic country must naturally not continue along this path. Acceptance of the conclusion according to which the Jazz Section trial was not a political one, would mean identification with the value order of the Communist regime. Common sense alone precludes this, as does the Judgment of the Constitutional Court of 21 December 1993, file No. Pl. ÚS 19/93, whereby it was found that "the Constitution …does not relate positive law merely to formal legality, but subordinates the interpretation and application of legal norms to the material sense of their contents, conditions the law by adhering to the fundamental constitutive values of a democratic society, and gauges the application of legal norms by such values. This means that even when there is continuity of old law, the values of the old regime are discontinued" (cf. in Collection of Judgments and Rulings, Vol. 1, p. 1, or Collection of Laws No. 14/1994).

47. c) The fact the criminal act of sedition was dealt with in the first instance by the District Courts was used by the High Court (p. 5 para. 4) for accepting the arguments of the secondary party (leaf number 153) who thus wanted to refute the statement that she had adjudicated political trials. However, the provisions of § 2 para. 1 clause d) of Act on Judicial Rehabilitation annul convictions for criminal acts specified under Head I of the Criminal Code, irrespective of which court was dealing with them in the first instance. (As for the political nature of the entire Head I of the Criminal Code, compare Collective: Soudní perzekuce politické povahy v Československu 1948-1989 /Judicial Persecution of a Political Nature in Czechoslovakia 1948-1989/, Prague, Institute of Contemporary History of the Academy of Sciences of the Czech Republic, 1993, p. 54; or in Novotný, O. et al., Trestní právo hmotné II. /Substantive Criminal Law II/, Prague, ASPI, 2004, p. 218). The High Court also stated (p. 5 para. 5 of the contested resolution) that the defendant, on the side of which the petitioner stood, allegedly did not sustain the burden of proof, since the secondary party did not adjudicate the case as a single judge. Such reasoning lacks any respect to the constitutional values on which the constitutional order of the Czech Republic is built; it is necessary to agree with the petitioner that it is an irrelevant statement in light of the fact that restriction of free expression of the petitioner was at stake, so this must be taken into account. Here, the High Court employed the principle of individual non-responsibility for a resolution, which cannot be accepted ipso jure. After all, there had been no pressure on the secondary party to work as a judge. The opinion that a judgment may be attributed to the chairman of the panel is lent support by the case Hrico v. Slovakia dealt with by the European Court of Human Rights (hereinafter "ECHR") (cf. official database of ECHR – HUDOC – on http://www.echr.coe.int/, the panel resolution dated 20 July 2004, No. 49418/99, § 46; or in Collection of Judgments of the ECHR No. 5/2004, p. 291). Nevertheless, even if the plaintiff had not chaired the panel, it would not have been possible to find any support that the statement "adjudicated political trials" is not true, not even by referring to the fact that it is impossible to find out which vote was cast by which judge (contrary on leaf number 113). The Constitutional Court is convinced that if there were reasons for such an

action, it would be proper to check the voting of the secondary party by opening the envelope containing the protocol on deliberation and voting. However, the plaintiff in the given case did not even claim being outvoted and, therefore, it is evident that considerations, or rather speculations, of the High Court in this respect were lent absolutely no support from the evidence presented.

48. As for the second statement: "(the secondary party) was evaluated as a judge who should be removed from the judiciary within the purification process, since she had been adjudicating in contravention of the valid law".
a) The disciplinary file of the secondary party, which was also presented by the Constitutional Court as evidence, has shown that the Minister of Justice filed, at the end of 1993, a proposal for removing Judge P. from her office. Yet the High Court stated that the burden of proof was not sustained with respect to the statement that the plaintiff was evaluated as a judge who should be removed from the judiciary. The disciplinary panel of the Supreme Court of the Czech Republic, deciding as an appeals panel (considering only the case of Mr. K. and Mr. M.), did not grant the proposal of the Minister since they concluded that it had been a solitary lapse on the part of the judge, and it was not proven as being her usual style of working, this being a condition required by the Act on Courts and Judges as interpreted by the Supreme Court of the Czech Republic. The petitioner did not conceal the result of such disciplinary proceedings in her report, however, it is clear that she based her statement on the opinion of the then Minister of Justice, as well as that of VONS, which she used as a basis for her statement.

b) The remaining duty was to assess the method in which the ordinary courts evaluated the truthfulness of the statement on the adjudicating practice of the secondary party as being "in contravention of the valid law". Even if the word "law" were understood technically in a very narrow way, i.e. its formal sense, the fact that the secondary party as the Chairwoman of the panel in the case of Jazz Section participated in violating the law results from the judgment of the Supreme Court file No. 11 Tz 9/91. Its reasoning shows that the point did not consist of a different legal opinion on the case, as was – completely perplexingly – stated by the High Court in the case now under consideration (p. 5 para. 4 of the contested judgment). The Constitutional Court does not consider it possible to dismiss the evaluation of judicial rehabilitation by Mr. K. and Mr. M., whose original conviction involved the secondary party, by saying that "the above-named persons were convicted in accordance with the legal order then in force" (p. 2 of the judgment of the High Court). It is completely evident that the resolutions annulled according to the Rehabilitation Act were clearly in conflict with the values acknowledged (briefly described) by all civilised countries, which were, in addition, defined by § 1 of the Act on Judicial Rehabilitation. Such values certainly include freedom of expression. Besides, this freedom was proclaimed also by the Constitution of the Czechoslovak Socialist Republic in the wording valid before 1989, albeit in a twisted form, and was in its integrity guaranteed by the Covenant on Civil and Political Rights (Decree by the Ministry for Foreign Affairs No. 120/76 Coll., hereinafter "Covenant") in Art. 19, becoming valid in the then Czechoslovak Socialist Republic on 23 March 1976. Formally legal guarantee of the freedom of expression through the then valid Constitution and through the Covenant only underline the commitment of every judge at that time to interpret the law so that the freedom of expression of a person standing before a court of justice was

respected. While the disciplinary panel of the High Court in Prague, in their resolution concerning the proposal by the Minister of Justice for removal of the secondary party from the office of judge, explicated formalistic theories on the controversial nature of prioritising the application of international treaties on human rights in the pre-1989 period, and thereby concluded that the secondary party may not be made accountable for not having applied the Covenant in the case of Mr. K. and Mr. M., since not even legal theory was unified in this respect, the disciplinary panel of the High Court completely failed to notice the obligation of a judge to adjudicate in accordance with the law (not only in accordance with formally apprehended acts), which, as a just verdict by a judge respecting in particular the fundamental rights of individuals, brings life to the letter of a formal act which was dormant until then. If a judge fails to discharge this obligation, then they adjudicate in contravention of law, and the terms “act” and “law” are, as is well known, used in general language as synonyms, or promiscue. A television report naturally uses everyday language. Therefore, puristic legal terminological clarity cannot be expected and, moreover, such clarity is (as the very development of law from the 2nd half of the 20th century has shown) merely illusionary even in the rigidly delineated realm of the law itself.

49. Thus it may be concluded that the statements included in the report “Nadoraz”, broadcast on 16 November and 17 November 1998, to the scope as included in the verdict of the contested judgment of the High Court, may be evaluated as true. When the High Court reached an opposite conclusion, the High Court violated the fundamental right of the petitioner to free expression, guaranteed by Art. 17 para. 1 of the Charter.

50. When the High Court focused their proceedings solely on the issue of the professional honour of the secondary party (leaf number 169), the High Court erred in procedure. The court should have taken into account that the case under consideration was not in the nature of a typical conflict between the two fundamental rights of private persons, but one between the fundamental rights of persons active in public life (see Judgment of the Constitutional Court of the Czech Republic file No. I. ÚS 453/03, see www.judikatura.cz). The petitioner is a journalist, the secondary party is a judge, and their professional honour is thus located within a sphere of involvement which is public, and that is why openness of information should apply to it. Reasoning on the impossibility of separating personal and professional lives (leaf number 15 verte) cannot grant a judge any immunity against public interest in the judge’s professional qualifications for holding such an office. Judge P. was the subject of examination in the report only to the extent of her professional life. Predictability in the exercise of the office of judge is a legitimate issue of public interest, in the same way as the quality of judicial deliberation in connection with the personal structure of the judiciary was an issue of public interest at the time of broadcast of the report in question. At that time, intense public discussion was in progress as regards addressing the past, both beyond and within the judiciary. This is also evidenced by a number of articles, commentaries, discussions, and interviews in the press, as well as on radio and television. The protection of professional honour of people active in public life is weakened in comparison to the exercise of the freedom of expression, which results from public interest in the control of power.

51. Therefore, it was not possible to restrict the freedom of speech by ordering an apology be aired, not even by referring to Art. 10 para. 2 of the Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter "Convention") which makes it possible to restrict the freedom of expression for the purpose of preserving the authority and impartiality of judicial power. However the Constitutional Court, referring to Art. 10 para. 2 of the Convention, committed the media to weigh up the terms and means employed (Judgment dated 2 February 1998, file No. IV. ÚS 154/97 in Collection of Judgments and Rulings, vol. 10, p. 113), this applied to a situation where information released about a judge was of a private nature and not related to the exercise of the office of judge, unlike in the case under consideration now.

52. Not even the case law of the ECHR, referring to a restrictive interpretation of the bounds of freedom of expression, grants judges complete immunity against basically truthful criticism supported by facts available, when the person concerned was given an opportunity to comment on such information and when such facts were not selected and set in a manipulative way (cf. in HUDOC, resolution of a panel dated 24 February 1997 in De Haes and Gijsels v. Belgium, 19983/92, § 48; or resolution of the Grand Chamber dated 6 May 2003, Perna v. Italy, 48898/99, § 39 in Overview of Judgments of the ECHR 3/2003, p. 129; or Prager and Oberschlick v. Austria, 15974/90, § 38; or in the LexData database). In the opinion of the Constitutional Court, the report of the petitioner honours such requirements.

53. In the past, the Constitutional Court has observed that when assessing the fundamental right to freedom of expression, from the viewpoint of Art. 10 para. 2 of the Convention, judges enjoy special protection. Nevertheless, judges who feel aggrieved by the exercise of the freedom of expression have, compared to other individuals, an obligation to greater tolerance and generosity (cf. Judgment dated 17 October 2000, file No. I. ÚS 211/99 in Collection of Judgments and Rulings, vol. 20, p. 75). Public criticism of judicial power is an important means of balance to judicial independence and, therefore, it is necessary to start on the presumption of admissibility of such expression, the intensity and contents of which do not diverge from the bounds of purpose (presumption of permissibility of criticism of public power; for similar approach to criticism of public matters cf. in Bouček, V., Ochrana cti dle práva anglického /Protection of Honour in English Law/, Legal Review Library, Prague, 1905, p. 14). If the independence of judicial power is implicitly protected as a necessary precondition to enable the judiciary to function, then, on the contrary, it must be possible, even by way of protecting the freedom of expression, to publicly control judicial power, taking into account the fact that the justness of the criticism is again assessed by courts themselves. According to the Constitutional Court, the purpose of the report was not to weaken the authority of the judicial power of a democratic country but strengthen it. The purpose of the report also did not include the dishonouring of the secondary party. Indeed, its purpose was to ask questions (which, however, judicial bodies, including the Ministry of Justice, for perplexing reasons refused to answer, resulting in the judiciary as a whole as well as the secondary party being aggrieved) and to find answers primarily to how the professional past of a judge is related to their present deliberating process. The claim that such a relation actually exists is self-evident in light of abundant foreign literature on the matter (e.g. Oliver W. Holmes, Jr., The

Common Law, 1881: “Life of law consists not of logic but experience”; Benjamin N. Cardoso, The Nature of the Judicial Process, 1921; K. Llewellyn, The Cheyenne Way, 1967).

54. In addition, the ordinary courts did not consider that an intervention of power into the freedom of expression should be used only subsidiarily, in such a situation when the damage cannot be rectified otherwise than through the intervention of the state (I. ÚS 367/03). Other kinds of defence might be, for example, employment of admissible means of opposing controversial opinions. If the plaintiff felt aggrieved by the report, there was nothing to keep her from making her own opinion known, supported by relevant facts from her professional career. A judge is a person active in public life, and the requirement for release of a professional biography in a form as complete as possible cannot be denied in reference to jeopardising judicial independence. The authority of the judiciary was not at all strengthened when the then Chairman of the Judicial Union harshly protested against broadcasting the report (leaf number 8), referring to the incapacity and prejudice of the petitioner. However, he did not comment on the merits of the statements contained in the report (“I do not want to lower myself to the level of argument of the people responsible for this programme”). Even the Vice-chairman of the Municipal Court in Prague of the time joined in the protest (leaf number 9), saying that the petitioner was not a person qualified to solve the problems of the Czech judiciary, which again was not accompanied with any data relating to the contents of the report. Self-determination on the part of a judge in terms of information on issues relating to their professional past is non-existent. Censorship of information and the free exchange of opinions concerning the work of judges, or any selection of individuals allowed to present such information, threaten the dignity of the judiciary to a greater degree than any possible controversial opinions expressed in discussion. If the courts imposed on the public their own evaluation of the past by the way of power, in particular under the circumstance that a considerable part of the public strongly disagrees with such an evaluation, they would weaken their own legitimacy, since it should not be overlooked that they are deciding on matters affecting themselves directly (a violation of the essential principle nemo iudex in causa sua). Therefore, they should proceed very cautiously and apply more sensitivity towards compliance with constitutional values and principles contained in the Czech constitutional order. Otherwise, the result will diminish trust in the law and the fundaments of a law-based state (Art. 1 para. 1 of the Constitution of the Czech Republic) will be undermined. Moreover, voices have been heard calling for stricter examination of individuals applying for the office of judge of ordinary courts (see, for example, a dissenting opinion by Ivana Janů, Justice of the Constitutional Court concerning the Judgment file No. Pl. ÚS 18/06, see www.judikatura.cz). Wherever the exercise of freedom of expression directly endangers the exercise of the judiciary, protection of the public law may be employed (§ 153 and § 169a of the Criminal Code), which calls for an entity different from the judicial power to undertake the initial step.

55. The Constitutional Court had to consider whether it was necessary to only annul the verdict of the judgment of the High Court specifically designated by the petitioner in the proposed verdict of her complaint, or whether there were reasons for annulment of the entire resolution. The Constitutional Court inclined to the latter option, since it was found that the entire resolution being annulled

impermissibly intervenes in the fundamental right of the petitioner to free expression. This fundamental right is also the true substantive subject of the proceedings, while the individual verdicts of the resolution being annulled may be considered only a procedural subject of proceedings.

56. Concerning the procedural aspect, from the viewpoint of constitutional conformity of "splitting the claims", the Constitutional Court expressed their negative opinion in Judgments file Nos. II. ÚS 117/04 and I. ÚS 85/04. In the latter, the Constitutional Court i.a. specified that a situation when, as a result of splitting the individual claims, each party falls under a different procedural mode is in contravention of the right to fair trial. The Constitutional Court sees no reason to deviate in this case from the above case law, and adds that the uncontested cassation verdict of the court of appeal is not capable of separate existence.

57. The purpose of the proceedings on a constitutional complaint is to provide protection to the fundamental right of the petitioner; on the contrary, its purpose is not extreme formalistic adherence to procedural legal norms up to such degree that the realisation of the true purpose of the proceedings on a constitutional complaint would be made impossible. The Constitutional Court is convinced that the interpretation of the legal norms applied must always be, most importantly, reasonable and governed by the purpose of providing effective protection to the rights which, according to the Constitutional Court's finding, were violated. As Rt. Hon. B. Mac Lachlin (Chief Justice of Canada) said, something more is to be respected than mere legal norms. In short, legal norms must be transformed into law. Distinguishing between governing by acts, which is typical of some developing countries, and governing by law, which is anticipated in well-developed democracies, sufficiently expresses the difference between a system effectively bound to statutory norms, and a proper legal system based on a certain foundation of values (a paraphrase of a statement by B. Mac Lachlin in 2005 in Wellington, New Zealand).

58. For all the above specified reasons, the Constitutional Court granted the constitutional complaint in accordance with the provisions of § 82 para. 2 clause a) of Act No. 182/1993 Coll. on the Constitutional Court, as amended by later regulations, and in accordance with the provisions of § 82 para. 3 clause a) of the same Act annulled the contested resolution of the High Court.

Note: This decision cannot be appealed (§ 54 para. 2 of the Act on the Constitutional Court).

Brno, 17 July 2007

Partially dissenting opinion of Justice Miloslav Výborný
to the verdict of ruling II in the case file No. IV. ÚS 23/05

I agree with the verdict of ruling I, which is that the judgment of the High Court in Prague dated 21 September 2004, No. 1 Co 85/2003-291 violated a fundamental right of the petitioner, guaranteed by Art. 17 para. 1 of the Charter of Fundamental Rights and Basic Freedoms.

The verdict of ruling II, accepted by majority of votes, annulled the specified judgment of the High Court in Prague in all its parts. For the reasons explained below I cannot agree with this.

Firstly, it is obvious that by cassation of the entire judgment of the court of appeal, the Constitutional Court exceeded the bounds of the requirement contained in the complaint since the petitioner formulated the proposed verdict absolutely clearly, when she requested – in short – that only such part of the judgment ordering the defendant to submit an apology be annulled. In this, the Judgment came into conflict with the settled case law of the Constitutional Court based on the ancient principle ultra petitum partium iudex condemnare non potest. Also, such verdicts of the contested judgment were annulled, against which it was possible to file an appeal on a point of law (i.a. a verdict by which parts of the indictment are denied, that is a verdict favourable for the petitioner), as well as cassational verdicts; I do not find reasons for this (contained in v para. 55-57 of the Judgment) to sufficiently justify the procedure employed, since even in this respect a resolution was made without respect to legal opinions which the Constitutional Court had dealt with many times in the past in relation to the procedural issues arisen.

I acknowledge that by partial modification, partial confirmation, and partial annulment of the judgment of the first-instance court, the court of appeal created a complicated procedural situation for all parties of the case in question. With respect to the affirmative and modifying parts of the resolution, the proceedings were closed with legal effect, but with an option of review on a point of law by the Supreme Court, partly admissible by law and partly conditionally admissible. The contents of the judgment on the verdict relating to the obligation to submit an apology additionally show that this verdict, even though it was designated as a modification, was in considerable part in fact an affirmative verdict, which further increased confusion in reasoning on admissibility of an appeal on a point of law. Furthermore, the defendant actually did file an appeal on a point of law, but she limited the scope of the review on a point of law she proposed to a completely minor issue, i.e. whether the imposed apology should be broadcast in the main news report or at a different time. It is true that, when I take into account not only that the apology was actually broadcast a long time ago, but especially that the apology was not justified, for reasons explained in detail in the Judgment (I consider, together with the majority of the panel, the resolution in this viewpoint to be an unconstitutional restriction of the freedom of expression), it seems to be absurd to examine the matter in the proceedings on a point of law, when this (no longer existent) obligation to apologise is to be discharged. Continuation of the case before a court of first instance, which should now formally (as the result of a partial cassation resolution from the court of appeal) examine whether there are

any reasons to grant the plaintiff, in addition to an apology, financial compensation, seems to be similarly unreasonable. The absurdity of such proceedings is completely evident, as the court is bound by the Judgment by which the Constitutional Court found that the obligation to apologise is unconstitutional.

However, dealing with so established procedural issues should have been either left to the ordinary courts (I believe that they would easily find a rational foothold for their procedure) or approved pursuant to the provisions of § 23 of the Act on the Constitutional Court. I believe it quite dangerous for the future that the accepted resolution should modify the until now consolidated case law of the Constitutional Court in such a way that in some cases it is possible that the same is left aside, without proceeding in accordance with the above-quoted legal provisions. In this matter, I refer to the conclusions of the Judgment in the case IV. ÚS 613/06 (available at www.judikatura.cz). I agree with the thesis according to which something more than mere legal norms must be respected. However, this thesis does not necessarily include a conclusion that legal norms do not demand to be respected, especially when such norms are those whose fairness has never been doubted.

I do not believe that in the given case the Constitutional Court would have fallen into “extreme formalistic adherence to procedural legal norms”, had they restricted their review only to such part of the judgment as was contested by the petitioner, in particular due to the fact that no fundamental right of the petitioner could have been doubted. The binding legal opinion of the Constitutional Court, according to which the petitioner’s right to freedom of expression (embedded by the quoted Art. of the Charter of Fundamental Rights and Basic Freedoms, but also, for example, in Art. 19 para. 2 of the International Covenant on Civil and Political Rights, or Art. 10 of the Convention on the Protection of Human Rights and Fundamental Freedoms) was violated by the verdict on the imposed apology, together with the annulment of such a verdict, sufficed to provide adequate protection to the petitioner’s fundamental rights. In my opinion, all that was passed in addition to this was not only procedurally questionable, but above all worthless.